RECEIVED
NOV 22 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of Review of the Pioneer's Preference Rules	ET Docket No. 93-266

REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Of Counsel:

Ronald L. Plesser
Mark J. Tauber
Nora E. Garrote
Emilio W. Cividanes
Mark J. O'Connor

PIPER & MARBURY
1200 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Douglas G. Smith
President

November 22, 1993

No. of Copies rec'd 0+4
List ABCDE

TABLE OF CONTENTS

DOCKET FILE COPY ORIGINAL RECEIVED
NOV 22 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

In the Matter of	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266

REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Omnipoint Communications, Inc. ("Omnipoint") hereby submits its reply comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding (the "NPRM") concerning the impact of the Commission's recently granted competitive bidding authority on the Commission's pioneer's preference program.

I. INTRODUCTION AND SUMMARY OF REPLY COMMENTS.

Overwhelmingly, the commenters support the continuance of the pioneer's preference program and reject the suggestion of retroactively repealing, diminishing, or charging for the licenses to be awarded to those companies that have received tentative pioneer's preference awards. Of the 46 parties commenting, 84% support the pioneer's program. Of the 36 parties commenting specifically on the 2GHz PCS proceeding, only five parties suggested repealing the program, and only three of those suggested retroactively repealing the tentative awards. It is particularly interesting to note that three of the five RBOCs commenting favored

continuing the pioneer's program and, of the two that opposed it (Southwestern Bell and BellSouth), only BellSouth, the one which did not even participate in the broadband PCS pioneer's process, suggested retroactively repealing the tentative 2GHz PCS awards. Further, the vast majority of those commenters which made allocation recommendations for the tentative 2GHz PCS pioneers argued against charging for or diminishing the award from the 30MHz licenses tentatively awarded.

Consider just some of the comments regarding the inequity of retroactively changing the rules on the tentative preference holders:

> "Any reversal in FCC policy, such as the retroactive changing of rules on the PCS pioneers, would send a negative signal to the investment community, shattering investors' faith in the FCC and in emerging communications companies, likely making the process of raising capital in the future much more problematic."
>
> Unterberg Harris at 1-2.

> "The possibility of the FCC retroactively changing the existing rules adds an intolerable dose of regulatory risk and uncertainty. The signal sent to investors will be negative and capital will seek other uses. Innovative wireless technologies will be left high and dry."
>
> Montgomery Securities at 1.

> "The Office of Advocacy concurs with the dissent of Commissioner Barrett that the Commission should not at this late stage abandon the pioneer's preference for those entities that have taken the initiative in developing new technologies and services. The Office of Advocacy opposes any mid-course

correction for those entities that have currently obtained preferences or those that are currently seeking preferences."
Small Business Administration Office of Advocacy at 2.

"Rescinding the pioneer preference rules would be inequitable and constitute an unfair shift in policy after many parties have invested a tremendous amount of time and money."
Pacific Bell and Nevada Bell at 1.

"It is grossly unfair to make them [the tentative PCS pioneers] bear the risk that the Commission may diminish the reward or eliminate the possibility of a pioneer's preference altogether." Associated Communications at 6

"In light of this record of stimulating technical creativity, it is clear that revoking awards through retroactive cancellation of the process would have a chilling effect far beyond the specific services involved. The potential future damage to be caused by such a step is difficult to estimate." Ameritech at 8.

". . . (three in the 2 GHz area) . . . will not significantly affect the efficacy of the auction process. . .[T]he applicants do have significant claim, as a matter of equity, namely, that they relied on the government's rules, played by those rules at considerable expense to themselves, and that therefore, the government . . . should adhere to the rules in their cases."
Henry Geller at 5-6.

"To exclude those pioneers now from obtaining the rewards they deserve would be grossly unfair, as well as short-sighted for the future development of services that may lead to other lucrative auctions."
PCN America at 5.

"To change course midstream, and eliminate the promised reward for those who have been induced to make the enormous commitment of resources to qualify for their governmental catalyst if competitive, will cause a severe

injustice, particularly to smaller entrepreneurial inventors . . . ."

Suite 12 Group at 16.

"Since all parties involved, including Cablevision filed their submissions in reliance upon the substantive standards and procedures as they existed at that time, it would be manifestly unfair for the Commission to apply any changes in its substantive PCS procedures and standards retroactively in the broadband PCS pioneer preference proceeding."

Cablevision Systems Corporation at 14.

"Entrepreneur innovators of broadband PCS, in response to the Commission's unambiguous offer of preferences, made decisions to invest their time, efforts and personal financial resources in the development of PCS techniques. As a result of the offer by the Commission of a preference and in accordance with the Commission preference policy, the pioneer's preference applicants have also made public the details of their plans and technologies. The Commission, therefore, should not now seek to retroactively apply any rule changes to the pioneer's preference applicants who proceeded under the current rules."

Rockwell International at 2.

These arguments against retroactivity support the case for treating the tentative pioneer preference holders on an expedited basis relative to the other issues in this NPRM. Further, because the Commission tentatively allocated 30MHz licenses to the tentative PCS pioneer's preference holders, all of these arguments against retroactivity also speak against repealing or diminishing the 30MHz awards in the PCS proceeding.

Perhaps nothing is so telling in this docket as which three companies argue in favor of retroactively repealing the tentative 2GHz PCS pioneer's preferences--GTE, the largest local

exchange company in the U.S. and the second largest U.S. cellular company in terms of "pops," BellSouth, the largest cellular telephone companies in the world in terms of "pops", and Nextel, the largest wireless license holder in the U.S., with access to 180 million "pops" and the only company with a "national" aggregation of licenses. Besides the fact that all three are giant "quasi-monopolies" with competitive reasons for opposing the tentative winners, what did they risk during the pioneer's preference process?

While the tentative pioneers disclosed their 2GHz innovations and publicly debated the solutions that brought PCS to reality, neither GTE nor BellSouth disclosed or risked any innovations at 2GHz and Nextel submitted a proposal based on an 800MHz technology developed and funded by Motorola, a company that supports pioneer's preferences. All three of these companies assume that innovation is its own reward, that capital is effortless to raise, and that auctions are a panacea for every public policy goal. It is particularly ironic that just a few months ago, when Nextel (then named Fleet Call) was still only a regional competitor it supported the pioneer's preference program and stated to the Commission "Fleet Call does not contest the Commission's tentative award of PCS pioneer's preferences to APC, Cox and Omnipoint."[1] Now that they have a national aggregation of

---

[1] Comments of Fleet Call in Docket No. 90-314 at 6 (January 29, 1993).

licenses, they argue for repealing these PCS pioneer's preferences retroactively.

II. PIONEERS, NOT AUCTIONS, BRING NEW TECHNOLOGIES TO THE COMMISSION.

A. AUCTIONING LICENSES DOES NOT SOLVE THE "INNOVATOR'S DILEMMA" OR ENCOURAGE INNOVATION.

The vast majority of commenting parties recognized that the Commission's authorization to use auctions does not remove the "Innovator's Dilemma" or the public policy reasons for encouraging innovation through the use of pioneer's preferences. It is particularly telling that of the five parties in the 2GHZ PCS proceeding which favor repeal of the pioneer's program, only one even addresses the issue underlying the "Innovator's Dilemma", i.e., Henry Geller. We will not repeat the arguments of the majority which clearly show why the innovator still faces the same dilemma as before auctions, but rather we will focus on replying to the Henry Geller's comments by way of example. Henry Geller is opposed to retracting the awards retroactively from the tentative pioneers, but his filing is the only one which makes the argument that pioneer's preferences are indeed a good policy but no longer necessary under auctions. It is critical to note, however, that Henry Geller's reasons come with an implicit caveat: pure flexibility in the use of spectrum. Reading his comments in their entirety makes it clear that the "Innovators Dilemma" is not solved simply by auctions.

As a tentative beneficiary of the pioneer's preference program, Omnipoint is grateful that Henry Geller proposed the idea along with his colleagues at the Washington Foundation several years ago. Having lived in the eye of the pioneer's preference storm, however, Omnipoint is painfully aware how fragile the recognition of innovation is and how auctions will make the program more, not less, critical to the survival of innovation among smaller companies.

"Geller's Caveat" to why pioneer's preferences are no longer needed is that if an innovator can buy up a license currently used for one application and, without disclosing its intentions, use the license for any purpose or service which it wants, then the "Innovator's Dilemma" that Omnipoint and others described in their comments is eliminated. In other words, if the innovator does not have to ask the Commission for an allocation but rather can buy, for example, a cellular license and use the frequencies to broadcast television, then Henry Geller contends that the Commission does not need to encourage innovation. Under a policy of pure flexibility in using, buying, and selling spectrum, Geller's point is that the innovator no longer faces the problem of revealing his innovations to the public because there is no request for an allocation.

But we are currently far from this hypothetical world of perfect flexibility. In fact, the recent auction legislation specifically instructs the FCC that it must use public interest

criteria in the **allocation of the *use of spectrum*** even if it now has authority to use auctions for the award of licenses after the allocation decision is made. 47 U.S.C. § 309(j)(3). Thus, the "Innovator's Dilemma" has not been removed, but rather codified into law.

The continuation of the "Innovator's Dilemma" can easily be seen by reexamining Henry Geller's analogy comparing the auctioning of RF spectrum to the auctioning of oil drilling rights. Geller Comments at 2. The problem with his analogy is that the true point of comparison between the two auctions is not the invention of a new drilling technique as Geller suggests, but rather the **Government's allocation of *the use of the* Continental Shelf** being auctioned. If the Government ***only*** allowed companies to drill for oil on the particular tracts to be sold at auction then the analogy would be like the current allocation rules for RF spectrum. Thus, if someone came along and wanted to mine for uranium on the tracts reserved for oil drilling, this innovator would have to petition the Government for a reallocation. The innovator would have to publicly explain why mining for uranium and not drilling for oil was a valuable reallocation for the use of that particular tract of ocean, explain why their underwater mining technique would work, subject themselves to the delays of comment and reply periods, NPRMs, etc. and thus, both give their idea away and lose any time or bidding advantage.

Clearly, the fact that the small innovator succeeds in persuading the Government to then auction off uranium mining rights gives it no advantage in obtaining those rights. In fact, this allocation process in a world of auctions has a negative impact on the small innovator's ability to outbid the giant natural resource companies, since it had to explain why the idea was valuable, thus driving up the price. This is precisely the situation facing RF innovators today if pioneer's preferences are abandoned.

As noted in Omnipoint's Comments, even if the Commission ultimately adopts a pure flexibility policy in the sale and use of spectrum, this would not eliminate all of the public policy reasons for having a pioneer's preference program. As we described in detail in those Comments, innovation would be driven into secrecy and smaller companies would be further disadvantaged. Lest anyone doubt that innovations would be driven into secrecy, consider the overt admission by one of the opponents of the pioneer's preference program, Paging Network:

> [I]n addition, parties need not disclose sensitive data publicly in order to obtain a license through competitive bidding. They can enter into protective agreements as necessary to ensure the selective dissemination of proprietary data within the financial community.[2]

Their goal is clearly that secrecy and selectivity among an elite few companies would become the norm. In contrast, Omnipoint

---

[2] Comments of Paging Network, Inc. at 5.

believes that the public is the beneficiary from the open discourse brought forward by the pioneer's preference incentive system.

B. THE DIFFICULTY OF SELECTING INNOVATORS DOES NOT JUSTIFY ABANDONING THE PIONEER'S PREFERENCE PROGRAM.

The second generic argument made by a few commenters for abandoning the pioneers preference program is that it is difficult to implement. But this is hardly a reason for abandoning a program which has had significant success in fulfilling the major public policy goal of encouraging innovation. Many Federal agencies must make difficult distinctions and decisions analogous to that facing the Commission in this area. For example, it has been noted by several parties that the Food and Drug Administration must determine what are "new" medical devices to determine when their responsibility for initiating oversight begins.

But a few commenters, such as BellSouth, attempt to argue that the pioneer's preference process is too "difficult". Their main argument is that the pioneer's preference process is flawed because it is not like the patent process. But this argument is a red herring. This issue was dealt with at the time of the pioneer's preference rulemaking. Patents serve a radically different purpose and bestow much greater rights than a pioneer's preference. Patents confer an exclusive, monopoly-like, right to the patent awardee. Thus the procedures which evolved in the patent area are different than those necessary for a pioneer's preference process.

A pioneer's preference winner has no monopoly rights similar to that of a patent holder, and indeed no guarantees at all which limit the rights of competitors. The fact that there are well over 2500 licenses in each of the two PCS proceedings demonstrates that there are no monopoly rights granted via a pioneer's preference. Patents grant 17 year monopolies and thus evolved the kind of procedural steps noted by BellSouth. Pioneer's preference winners have no rights over any other party, take nothing from any other party, and deny no one else access to the market for any service. Thus, BellSouth's arguments are an example of an illusionary problem.

Further, even the patent process is difficult but no one suggests it should be abandoned. In fact the giant telephone companies' very existence stems from perhaps the most contentious patent award ever made--the filing by Alexander Graham Bell just hours before a nearly identical patent filed. The validity of that patent was contested repeatedly over decades. Had the award been only that of a pioneer's preference for one license among 2500, or even 102, the ownership of the telephony industry might be radically different today.

III. ARGUMENTS THAT AUCTIONS GIVE PIONEER'S LICENSES AN UNFAIR COMPETITIVE ADVANTAGE ARE BASED ON TOTALLY FALSE ASSUMPTIONS

Several parties in the 2GHz PCS proceeding, again primarily giant telecom companies-- Southwestern Bell, NYNEX, PacBell, Nextel--argue that the outright award of a license to a pioneer's preference winner is somehow unfair to them now that there will be auctions. Specifically, they argue that auctions change the "competitive dynamics" because, unlike a lottery system, they will now have to pay for their licenses, while the pioneers will receive their licenses for "free." Indeed, this complaint, in large part, appears to be responsible for the sudden issuance of this NPRM on the pioneer's preference policy.[3]

First, the statement that the advent of auctions created an unfair cost advantage to the pioneers is either disingenuous or impossibly naive. Absolutely nothing changed with respect to the issue of how much non-pioneers would pay for their licenses when the licensing mechanism shifted from lotteries to auctions. Before auctions, every company which seriously wanted a PCS license knew it would have to buy the licenses from the lottery winners. No parties, in any comment in any proceeding, suggested that the "competitive dynamics" would be distorted by awarding pioneers "free" licenses when they thought that all other licenses would be initially awarded by lottery and purchased in the aftermarket. Yet

---

[3] Southwestern Bell Corporation, Letter re: Personal Communications Services and Pioneer Preference Issues at 3 (October 14, 1993) ("SWB Letter").

the probability that any particular company would win a "lottery" license of its choice in an area where a pioneer's preference license had been awarded was infinitesimally small. In the 220MHz allocation, for example, the Commission received 60,000 lottery applications in just the first two days. These were for 5 Kilohertz channels; one can only imagine how many lottery applications would have been filed in a lottery context for each 30 Megahertz PCS license.

The entire experience with lotteries in cellular resulted in the so-called "private auctions." Indeed, Southwestern Bell, one of the most insistent in implying that it would have received it's PCS licenses for free if only lotteries had been continued, bought 20 cellular licenses which were originally awarded via lottery. Unless Southwestern Bell thought it was suddenly going to be the lucky 1 in 60,000 in PCS, it knew it would end up buying its PCS licenses in another round of private auctions if lotteries had been maintained. Thus, this "new competitive unfairness" issue is a complete illusion; nothing changed for the non-pioneers with respect to how much they would pay.

The second fallacy in this alleged competitive unfairness argument is the assertion that companies like Omnipoint would be getting their license for free. Omnipoint not only invested tens of millions of dollars and its "sweat equity" specifically because of the pioneer's preference incentive, but it did so at a time of great uncertainty as to whether this would result in obtaining a

license. GTE, BellSouth, and NYNEX risked nothing in the 2Ghz pioneers process, but merely stood on the sidelines learning from the innovations and experimental reports of others, waiting to buy the 2GHz PCS licenses from either the lottery winners or directly from the Government. Thus, instead of being "free", Omnipoint's risk-adjusted investment for a license will match what many parties will pay with their riskless dollars in the auction.

But the most absurd premise in these " new competitive unfairness" arguments is the assertion that the cost advantages of a license awarded to innovators without additional charges beyond the costs of innovation will destroy the economic viability of the non-pioneer's businesses, or would give an advantage which Southwestern Bell calls "insuperable."[4] But no one is charging these companies for their licenses, they are bidding on them. These giant telecom companies are implying that they are so incapable of controlling their own bidding that they fear they will pay too high a price for a license knowing that the price prevents them from being able to compete. In short, they are asking the government to protect them from themselves so they do not bid their companies into bankruptcy.

These same companies which claim that the market is so efficient that it will automatically find and reward innovation, are arguing that the market is incapable of absorbing the fact that, in a handful of particular geographic areas, one of the seven

---

[4] SWB Letter at 3.

new licenses will be awarded for innovation. If this were true, it would mean the market is incapable of dealing with the consequences of introducing seven new licenses into every market. What will these companies do, for example, if sequential auctions are used in a manner proposed by the Auction NPRM and after they have bought their license another license goes for "free" because no one bids on it? What if more than one license goes for "free" for the same reason? This is hardly an improbable scenario considering that of the seven licenses and 153MHz of spectrum awarded in the U.K. in 1989, six of the seven licenses lie fallow today despite having all been awarded at no charge.

Further, to say the market cannot assimilate the participation of a company awarded a license for innovation because it bestows a cost advantage would mean that the market is unable to deal with the cost advantages that many other companies already have. Long distance providers have much greater cost advantages than the pioneers, because they can use their licenses to save billions of dollars through bypassing local access charges. Most ironically, this cost advantage argument would mean that it is hopeless for any company in PCS to compete against these very telecom companies who are complaining, since these companies not only truly received their cellular licenses for free, but they have what many have called an insuperable headstart advantage in offering PCS at their cellular frequencies.

Thus, relative to all other factors that make the playing field uneven, issuing a tiny number of pioneer's preferences will have a negligible competitive effect among the thousands of licenses which will be allocated and bid for by disparate parties with different vested interests and different costs of capital.

But of all the reasons not to charge for the licenses awarded to those pioneers which are ultimately finalized in the broadband PCS proceeding, the primary reason is not economic but ethical: charging for the license was not the deal offered by the Commission's rules. Even if the Commission decides that in the future the preference award should be a discount in the competitive bidding process, that was not what was held out to the participants in the PCS proceeding. The risks and investments that were undertaken in the PCS pioneer's race were induced by an unambiguous promise of "a guarantee to a license . . . not subject to competing applications." The deal was not a "discount."

Everyone knew from the beginning of the pioneer's preference program that the pioneer's award in PCS was a free license to offer the service proposed. Everyone knew that the size and value of the license had nothing to do with whether there was auction authority, because everyone knew that competing bids had no meaning when there were no competing applications. Everyone knew that it was not a "comparative" or "weighted" preference, such as an auction discount, because the Commission stated this. The FCC

reiterated why that would be wrong during the reconsideration process when it stated:

> A weighted preference would provide no assurance to the innovative party that it would, in fact, receive a license. As we stated in the Report and Order, any approach that would permit an innovator to be foreclosed from a license by another party would undermine the value of the preference and thereby fail to accomplish its public interest purpose. Consequently, we affirm that the preference will be dispositive.[5]

None of the few parties now claiming a disadvantage challenged the Commission's final say on this--it is now the law.

When the PCS NPRM and tentative decision on the PCS pioneers was issued over a year ago in October 1992, the pioneers were tentatively awarded 30MHz allocations. Everyone knew that preference holders would be on a separate track and that all others would end up buying their licenses from the lottery winners if auctions were not authorized. And most importantly, everyone knew that the licenses would be perceived as being valuable. At that time, the Commission had even considered awarding only two national and 49 regional licenses. Thus, a pioneer's preference license would have had to have been perceived as being even more valuable at the time of the tentative awards than today. Yet, no one in the comments or reply comments on the PCS pioneer's tentative decisions suggested that the program be abolished, that an award of these

---

[5] Memorandum Opinion and Order, 7 FCC Rcd. 1808, 1809 (1992).

30MHz licenses was too great, or that the award should be diminished through charging a price. There are now twice as many 30MHz licenses as were once considered for allocation, and a total of more than 2500 broadband PCS licenses. Thus, irrespective of the introduction of auctions, the pioneer's preference licenses are worth less today than when everyone thought all other licenses would be allocated by lottery. But no one complained about their value six months ago, or suggested the notion of a "windfall," and all of those not awarded a pioneer's preference knew they would have to buy their licenses from the lottery winners.[6]

IV. PIONEERS ARE ON A SEPARATE LICENSING TRACK FROM COMPETITIVE BIDDING.

The allocation mechanism for the pioneer's preference program is legally distinct from the competitive bidding allocation mechanism. The 1993 Budget Act limits the Commission's authority to allocate licenses using competitive bidding to "mutually exclusive applications [ ] accepted for filing." 47 U.S.C. § 309(j)(1). The Commission is prohibited by its own rules from accepting applications for spectrum for which a pioneer has properly applied:

[6] GTE even suggests now that if lotteries are reinstated then pioneer's preferences should be reinstated. Clearly then, there is no issue of "cost advantage" or "windfall" to the pioneers. Comments of GTE at 5.

> If awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications.

47 C.F.R. § 1.402(d) (emphasis added). The 1993 Budget Act was enacted by Congress with full knowledge of the program and the Act expressly supports it; the statute and legislative history express no doubt or ambiguity toward the program. Omnipoint respectfully submits that those Commenters which claim ambiguity in the law are, in effect, asking the Commission to reconsider the exact issue that Congress has already settled, i.e., pioneers are not part of the competitive bidding process. In particular, the comments of Southwestern Bell have fueled this alleged confusion over Congressional intent by misciting the legislative history. At page 4 of Southwestern Bell's cites and quotes so-called "neutrality" language and attributes it incorrectly to the Conference Committee. However, the quoted language comes from the House Report and not the Conference Report. See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 257 (1993). As stated in Omnipoint's Comments, the Conference Committee rejected the language of the House Bill. H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. at 485 (1993).

Further, BellSouth Corporation argues that the pioneer's preference program is insupportable because it does not further the legislative goals enunciated by Congress in support of the auction scheme. BellSouth Comments at 4-7. That position is incorrect both as a matter of statutory construction and as a matter of policy. First, Congress' goals in the auction legislation do not

exist in a vacuum; they must be interpreted in the legislative context in which Congress formulated them. The auction legislation itself reflects Congress' way to address and promote the stated goals. Since the pioneer's preference program is not encompassed within the Commission's bidding authority and is a separate licensing tract, it is incorrect to merely presume, as BellSouth does, that the pioneer's program can only survive if it fosters the goals of an unrelated licensing scheme.

Second, BellSouth's argument flies in the face of the very statutory scheme that it relies on. As part of the auction legislation and without suggesting any adverse effect on the underlying legislative goals, Congress expressly answered the question that the Commission seeks to address in this proceeding--does the auction legislation in any way affect the authority of the Commission to implement the pioneer's preference program. The answer is in the language and is a clear "no." Comments of Omnipoint at 10-16.

Finally, as Omnipoint addressed in detail in its Comments, the goals of the auction legislation, even if extrapolated out of their legislative context as BellSouth does, are not undermined in any way by the pioneer's program. To the contrary, the goals of both programs complement and promote each other. The pioneer's preference program undoubtedly advances the development of technologies, fosters their rapid introduction to the American public, gives an incentive to new entrants into a

marketplace that is largely dominated by a few, and, as a result of all that, creates and enhances the value of the licenses to be awarded by the auction process. Thus, BellSouth's failed efforts at legislative construction hardly provide a basis upon which the Commission can discard its program to reward innovators.

In an effort to cloud what is otherwise a clear Congressional "green light" to the pioneer's program, some commenters have disingenuously misconstrued the clear language of the Commission's pioneer's preference rules. Southwestern Bell in direct contradiction of the express language of Section 1.402(d) of the Commission's rules, argues that "[t]he Commission's current pioneer's preference rules do not state that the spectrum award is not subject to "mutually exclusive" applications for spectrum use."[7] It is difficult to fathom how Southwestern Bell can reconcile its position with the Commission's rules. Its position is both ethically and legally wrong but it should not be confusing because, to repeat, the Commission's rules state that the pioneer's application is "not subject to mutually exclusive applications." Southwestern Bell's position to the contrary is nothing but a smoke screen.

Southwestern Bell also argues that, because a use of the spectrum (such as PCS) would bring the service within Section

---

[7] Comments of Southwestern Bell Corporation at 5-6. Only one month ago, on October 14, 1993, Southwestern Bell submitted this same "interpretation" to the Commission in connection with the preference award to Mtel.

309(j)(2), then automatically all applicants for that use must be subject to being charged pursuant to the Commission's competitive bidding authority.[8] Once again, refuses to give credence to the clear language of the auction statute. Section 309(j)(2) of the auction statute, on which Southwestern Bell relies, does not authorize the Commission to charge individual applicants. It is plainly meant only to identify classes of services subject to licensing; the section is entitled "USES TO WHICH AUTHORITY MAY APPLY." The Commission's authority to charge and the conditions for such authority are found in Section 309(j)(1), entitled "GENERAL AUTHORITY." Section 309(j)(1) places two limitations on the Commission's authority to charge fees pursuant to competitive bidding: it only applies (1) to services that meet the standards of Section 309(j)(2); and (2) in situations where the Commission has accepted mutually exclusive applications for one of those services.[9] Contrary to Southwestern Bell's allegations, pioneers do not file mutually exclusive applications.

---

[8] Nextel also adopts this statutory interpretation when it states: "[t]here is not legal or policy justification for exempting licensing preference grantees from paying the approximate market price for the "for-profit" use of public spectrum resources." Comments of Nextel Communications, Inc. at 9. See also Comments of Pagemart, Inc. at 7.

[9] The Commission has also explained this two-part statutory test in the notice of proposed rulemaking on competitive bidding. See In the Matter of Implementation of Section 309(j) of the Communications Act, Notice of Proposed Rulemaking, P.P. Docket No. 93-253 ¶¶ 21, 22 (released October 12, 1993).

V. RETROACTIVE APPLICATION OF MODIFIED RULES IS IMPERMISSIBLE.

An overwhelming majority of the Commenters agree on the fundamental point that retroactive application of any rule changes to the tentative preference holders would be unfair.[10] The commenters that favored retroactivity have failed to demonstrate, and most even failed to argue, any legal or equitable basis on which the Commission could base such an extraordinary action against the 2GHz tentative preference holders. In contrast, Omnipoint and the other commenters who oppose retroactivity have amply supported their legal and equitable objections.

Only two legal arguments were raised in favor of retroactivity as to the preference pioneers: one rests largely on an inappropriate analogy between applicants in established services and PCS tentative preference holders and the other misconstrues the 1993 Budget Act. Paging Network, Inc., relies on U.S. v. Storer[11] for the proposition that, until the Commission makes a final action on the pioneer's application, the tentative preference pioneers have no rights under the pioneer's preference program.[12] However, Storer does not even remotely stand for that proposition. Storer challenged the Commission's authority under the Communications Act

---

[10] Even Henry Geller, who opposes the continuance of the program, recognizes that the tentative preference holders "have significant claims as a matter of equity" and that the Commission "should adhere to the rules." Comments of Henry Geller at 6.

[11] 351 U.S. 192 (1956).

[12] Comments of Paging Network, Inc. at 9.